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## THE COEFFICIENTS OF IMPUNITY.

(Being an Inquiry into the Social Defence against Crime.)

In these days of penal and criminal reforms it may well be asked, "Are we sufficiently protecting the law-abiding majority against the attacks of the enemies of law and order, which constitute a minority?" "Does our criminal and penal legislation and the machinery of the law as at present operated constitute an adequate social defence against crime?"

The first step towards the ascertainment of a correct answer must necessarily be a comparison between the means of offence within the reach of the criminal with the means of defence used by the state.

It should be understood that in fighting criminals, especially thieves, forgers, embezzlers, as well as the so-called born criminals, we encounter no commonplace intelligence, but, as Major Griffiths has amply shown in his recent book ("Mysteries of Police and Crime"), a lively and cunning energy.

It will be my endeavor to show that the most dangerous and efficient weapon of offence in the hands of malefactors is what might be called the tenderness of our laws and customs towards persons accused of crime. It is not my purpose to examine the subtle distinctions which our courts have ingeniously made in the definition and application of the ancient doctrine of "reasonable doubt." I examine it from the standpoint of the offender, and to him it means nothing more or less than his chances of escape. These have been rightly called "the coefficients of impunity" and it is these that we must carefully study.

These coefficients may be divided into two classes, viz: those which may be called *legal*, because sanctioned by law or not forbidden by it, and *social*, because arising from causes which are extra-judicial or extra-statutory.

Looking first at the *legal* coefficients of impunity let us

see how many chances of escape a criminal possesses as against the chances of conviction. He may

1. Escape arrest by escaping detection (so-called mysterious crimes).

2. He may be suspected but never arrested, if the suspicions are not technically sufficient to justify an arrest.

3. If he is arrested he has two chances of escaping indictment, first by being discharged by the committing magistrate and second by a failure of the Grand Jury to indict him.

4. If he is indicted he has the following chances of never being tried: first, he may be bailed and may jump his bail; second, the indictment may be pigeon-holed; third, the indictment may be quashed; fourth, the witnesses for the prosecution may die or disappear; fifth, he may be discharged on the recommendation of the prosecuting officer.

5. If he is brought to trial, his chances of escape may, in a rough way, be summed up as follows: first, acquittal for lack of proof of guilt beyond a reasonable doubt; second, acquittal on a technical defence such as the statute of limitations; third, a disagreement of the jury, which generally means discharge of the accused.

6. If he is convicted, his chances of escape are: first, reversal on appeal; second, executive clemency.

Let us now examine these coefficients in some detail. Unfortunately statistics on matters criminal are not very complete and satisfactory. Statistical data are especially lacking as regards the question of "mysterious crimes" in which the offender has never been discovered. The police are naturally averse to making such records public for they essentially amount to a statement of the inefficiency of the Detective Bureau.

I have kept a record of murders in New York City from 1895 to 1898 in which the murderer escaped detection. There were at least thirty-five such, of which some twenty were of such a sensational and shocking nature that they elicited not only the special attention of the police and detective forces of the largest city in our country, but also called into play the aid of an enterprising press. Yet the murderers of all these victims are still at large.

Before this appalling list of unpunished murderers, minor crimes seem unimportant. Yet I am informed that within a period of three years and during an honest police administration, there were over fifteen hundred burglaries, robberies and minor crimes committed in New York City, of which the perpetrators were never discovered.

J. Holt Schooling in a series of interesting statistics arrives at the conclusion that only fifty out of every one hundred crimes reported to the police are traced to their perpetrators, although prosecutions are held in seventy-five cases out of every one hundred crimes. That is to say, 25 per cent of crimes are perpetrated so successfully that even a *prima facie* case cannot be established, while 50 per cent of all crimes go unpunished. And this in a country like England, which is justly proud of its police system. Other statistics show an even greater percentage of impunity. Thus the proportion between crimes and arrests in England is stated to have varied from 44 to 45 per cent in 1886-87 and to have risen to 46.8 per cent in 1892-93. Turning to other countries we find that since 1825 it has been estimated that in France there have been 80,000 crimes committed where the offenders were never discovered. In Italy, according to the statistics of 1895, there were 102,004 trials against known parties as against 36,751 unknown parties. The official statistics of that kingdom show that 44,113 crimes went unpunished in 1885, 64,385 in 1890 and 63,147 in 1892. The poverty of statistical data based on scientific principles in our country makes it impossible to give the percentage of impunity in the United States, but the figures furnished by the county of New York, cited above, show that we have nothing to boast of in our success in detecting crimes and bringing their perpetrators to justice.

We can hastily pass over the second point which cannot be made a subject of statistical study. I refer to those criminals against whom suspicion exists, but of such a slim nature that under our laws no arrest can be made,—cases where there is a moral certainty, which could be very easily converted into a legal certainty by the prompt apprehension and close surveillance of the suspected. So that it may be said that a criminal may not even completely hide

his tracks; it is sufficient if he covers the most damning ones!

A passing consideration of the third legal coefficient of impunity will suffice. It often happens that the police are certain that a suspected person is the guilty one, but they do not possess sufficient evidence, or oftener, do not have the skill to make out a technically perfect *prima facie* case. The committing magistrate looking upon the evidence in a *legal* light finds it insufficient to hold the prisoner and gives him the benefit of the doubt. The police may afterwards be able to perfect their case, but it is then, often, too late. Or again, the Grand Jury, in the pressure of other cases, may fail to indict the accused, who thereupon on the application of his lawyer, who pleads the "undeniable right" of a man not to be unduly restrained of his liberty, is set free.

Of 1,475 arrests for felonies in New York County during three months, 615 were released during the said period. Of these five died before trial, 117 were acquitted and 493, or over 62 per cent, were discharged without trial. This may give an idea of how many escape at the preliminary skirmish with the forces of law.

How many who are indicted are ever brought to trial? No one knows, not even the District Attorney. The invention of the pigeon-hole has been the greatest boon to the criminal who is fortunate enough (and many of them are) to have either a "pull" or to be able to procure bail, or has sense enough to avoid the commission of any crime of a sensational or interesting character, such as will enlist the professional sympathy of the prosecuting officer. And how many more escape trial by having their indictments quashed on a technicality, which the District Attorney seldom corrects, or by delaying the day of reckoning until the death of important witnesses, fills the prosecuting officer with a feeling of "convenient mercy" which induces him to recommend to the court the discharge of the prisoner!

The sifting process goes on and guilty men disentangle themselves from the thin, loose meshes of the law until only a very few are left for trial. Then the process begins again; but with a new advantage to the accused, for, at the trial, he has the services of learned lawyers, well up in all pro-

fessional tricks, distinctions and oratorical inducements. The legal battle may suddenly end in an acquittal on proof that the crime is barred by time. If no such plea is raised what a titanic labor is before the prosecuting officer in order to obtain a conviction! He must convince twelve men *beyond a reasonable doubt* that a crime has been committed by the accused whom they are solemnly instructed to consider innocent until conviction; he must prove to them *beyond a reasonable doubt* that the accused is perfectly sane and was sane when he committed the act; he must establish by legal evidence the act and the motive which prompted it and prove his guilt by the production of facts, which, by the very nature of the act charged, are well-nigh impossible of production; he must offset the evidence of the defence, destroy its force and overcome the natural tendency of jurors to acquit. He must do all this in conformity with countless ambiguous rules of procedure and principles of evidence, because one single slip may suffice to give grounds for reversal on appeal. If he succeeds in convincing only eleven of these twelve good men and true, if he cannot free the conscience of the twelfth man of a "*reasonable doubt*," his work has been all in vain, except in showing his hand to the defence. Or if he falls into any pitfall prepared by the shrewdness of the defence, his work, though otherwise perfect, will likewise have been in vain. Disagreement of the jury or reversal on appeal means, in most cases, acquittal.

With consistent tenderness towards the accused, our laws provide that no man's life shall be twice put in jeopardy for the same offence. The absence of the right of appeal on the part of the state in criminal cases which is restricted on the part of the defendant results as was recently pointed out in the *American Law Review*, in such delay and technical obstruction "that an outraged people have become thoroughly tired of it." And it cannot be denied that the existence of this ancient principle of not jeopardizing a man's life twice for the same crime often means that, if a criminal is acquitted by reason of a hastily prepared case or on a technicality, the most damning proof that may thereafter be found against him will be useless and unavailable. So that the social defence is so conducted under our laws that we may

not only have an *unknown* criminal at our side which the state has been unable to detect, but we may also have to tolerate a *known* one whom the law has bound itself to keep out of prison.

Let us now consider the last legal coefficient of impunity. Of the small proportion that are convicted, what part pay the full penalties for their misdeeds? The abuse of the pardoning power is an old subject and a few statistics on that point will suffice. The official records of New York State show that between 1846 and 1896 there were granted 80 full pardons from life sentences, 4,453 full pardons from lesser sentences, besides 226 conditional pardons. Add to these 111 commutations from capital punishment to life imprisonment and 1,758 commutations from lesser sentences and we have a total of 6,448 interferences with the decrees of the courts in half a century! It has been estimated (though I cannot vouch for its correctness) that the percentage of criminals released by executive clemency is 50 in Massachusetts and 33 in Wisconsin; and that the average time served by pardoned life prisoners is  $6\frac{1}{4}$  years in Massachusetts and  $6\frac{1}{2}$  years in New York.

Thus, from first to last, the social defence as provided by our laws, by favoring the offender and giving him numberless chances of escape, ignores the principle that the law's first object is the protection of the honest citizen.

But there are other coefficients of impunity besides these legalized methods, which may be called the official protection; and which, as I have tried to show, protect the offender and not the offended. I refer to an *imperfect* or *mistaken public morality*. This *social complicity* in crime, as it has been aptly called, is observable under many forms. There is, first, a popular tolerance, mistakenly called pity, for certain criminal acts, notably crimes of passion or so-called crimes of honor. Duelling is, fortunately, on the decline in our country, but emotional and hysterical acquittals of persons guilty of taking the law into their own hands to avenge their honor are by no means uncommon. The evils of such acquittals, which amount to a glorification of crime, are too obvious to require explanation.

The social complicity as a coefficient of impunity is es-

pecially harmful in those very numerous instances in which honest men and women become accomplices in crime, either by timidity or by the desire of avoiding trouble. How many crimes, such as petty thefts, go unpunished because the victim shrinks from entering a police court and going through the trouble of a trial? How many offences which we think we condone out of pity, or magnanimity, are really excused for the sake of saving ourselves time and trouble? We stifle the voice of our consciences by saying it is a small matter, or that it will never be repeated or that every one should have a chance. Yet the most experienced penologists, the best scholars of criminal science, tell us that such forgiveness aids, instead of checking criminality, that it induces the offender to repeat the act, having learned that it may go unpunished. And, while it is true that offences of this kind are generally petty and insignificant, yet in criminal life, as in the moral life, nothing is so important as to "be-ware of small beginnings."

There is also a marked social complicity among the better classes resulting from that *esprit de corps* engendered by societies and clubs. How many minor offences committed in a college, a club, or a private community of men, are never reported to the police, because it might injure the good name of the institution?

And let us not forget that there is also a professional and commercial complicity such as that of lawyers who stoop to the fabrication of testimony, of doctors who aid in the avoidance of natural duties and responsibilities; of business men who by "deceit and adulterations which furnish the illusion of cheapness" set the example for criminal imitation among the masses. As one of our best students of penal problems has justly observed, "many of the maxims and practices of the business world are essentially dishonest and they are glibly cited by convicted criminals in justification of their own misconduct."

These are a few examples of social complicity with crime, a few of the coefficients of its impunity, out of the mass of passive or active potentialities that are arrayed against the insufficient defences of the state. If the consequences of such a state of affairs, of such weakness of the social de-



fence, are not as serious as one would imagine, it is because the criminal class is not a large one. According to the census of 1890 the number of criminals in our prisons was 82,329, a very small percentage of the population of 50,000,000. By the same census there were 14,846 juvenile delinquents in asylums and 14,371,893 children in our public schools. Even adding undetected criminals and what might be called latent-criminals, the total of the criminal population would not probably reach a very large percentage of our entire population. But its small size cannot be an excuse for our inefficient social defence against it; by reason of its contagious properties and, unfortunately, of our lack of moral strength, crime stands as a perpetual menace to our welfare and, though we cannot blot it out of existence, we must at any rate spare no effort to minimize its power for evil.

It would be beyond the limits of this article to examine the various methods of strengthening the social defence which have been suggested by sociologists and students of crime. But from the facts above set forth it may be stated, in a general way, that the social defence against crime, to be successful and effective, must be two-fold; it must consist first of a standing army composed of well-trained and experienced men assigned to various special duties. These are the judges of our courts, the prosecuting officers who represent the people, the police who do picket duty against crime, the detective force which spies on the enemy, the experts who help to unravel difficult questions and the various officers, such as sheriffs, prison-wardens and keepers who execute the mandates of the courts. But this standing army must be supported in the battle for the social defence by a *national guard* or *militia* recruited from all ranks of honest citizens who desire the continuance of the supremacy of the law.

The co-operation of these two armies will not eradicate crime, but it will minimize its power for evil; it will diminish the chances of impunity and thereby deplenish the ranks of malefactors.

And let us remember that the battles fought by these two armies against the enemies of law and order will fur-

nish as excellent opportunities for the display of heroic civic virtues as are afforded by the most imposing of military operations. There is nothing so illogical as to imagine that our duty to the state is limited to our defending it against the armed aggressions of a foreign foe. There are more insidious enemies which attack it from within ; to fight these is one of the great duties of citizenship.

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